Commercial Union Assurance (M) Sdn Bhd v Ng Chek Hung and another appeal

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-97 OF 1995 CONSOLIDATED WITH CIVIL APPEAL NO W-02-98 OF 1995
GOPAL SRI RAM, NH CHAN AND ABDUL MALEK AHMAD JJCA
20 MARCH 1997

Civil Procedure *— Appeal — Fact, finding of — Judicial appreciation of evidence — Audio visual advantage rule — Whether the appellate court, bereft of the advantages which the trial judge had, was in a position to say whether witnesses were telling the truth*

Insurance *— Fire insurance — Fraudulent claim — Whether fraud in making claim — Insurance policies unvalued — Proof of loss — Question of fact*

The respondents had their premises and goods insured with the appellant, an insurance company, under two policies of insurance. On 11 October 1984, the amounts insured under both policies were increased. On 30 November 1984, a fire broke out as a result of which the premises and the goods were damaged. The respondents thus claimed against the appellant for the damage. Subsequently, criminal proceedings were instituted against the respondents under s 436 of the Penal Code (FMS Cap 45) at the Taiping Sessions Court. The respondents were acquitted.

At the trial, the appellant alleged that the respondents had secreted away household and other goods from the premises shortly before the fire. DW2 and DW3, who had given evidence at the criminal trial before the Taiping Sessions Court, gave evidence for the appellant at the trial. DW2's evidence-in-chief was materially different from that he had given at the criminal trial and contradictory to that of DW3. The learned judge, after assessing the evidence, rejected the appellant's contention that there had been fraud on the part of the respondents in making the claim. He accepted the respondents' explanation that most of the material in proof of the alleged loss had perished in the fire which took place close to the date when the premises and contents were last inspected by the appellant's agent. Judgment was entered for the sums insured. In support of the credibility of DW2 and DW3, it was contended that: (i) there was no real judicial appreciation of their evidence; and (ii) the respondents had not proved their actual loss on the policies which were unvalued.

Held, dismissing the appeal:

(1) The learned judge was entitled to take into account discrepancies in and between the evidence of DW2 and DW3. The attack against the learned judge's finding that there was no fraud on the part of the respondents in making the claim was really based on judicial appreciation of evidence to which the audio visual advantage rule applied. The court, bereft of the advantages which the trial judge had, was not in a position to say whether DW2

and DW3 were telling the truth (see pp 470D–I and 471A); *Clarke v Edinburgh Tramways Co* [1919] SC (HL) 35 followed. A

(2) The close proximity in time between the inspection by the appellant's agent and the fire — taken together with the destruction of supportive documents — well entitled the learned judge to conclude that the loss as claimed had been established. B Further, where a policy of insurance was unvalued, such as those in the instant case, it was a question of fact on the evidence whether the loss had been proved to the satisfaction of the trier of primary facts to whom the law had entrusted the duty to assess the evidence (see p 471B–D).

C

Per curiam:

While s 157 of the Evidence Act 1950 allows such previous consistent statement to be used to support the testimony of a witness, it is confirmation of the weakest kind. Repetition, though it be made a hundred times over, cannot make firm testimony that suffers from D infirmity (see p 470C); *Mohamed Ali v PP* [1962] MLJ 230 followed.

[Bahasa Malaysia summary

Penentang-penentang telah menginsuranskan premis dan barangan mereka dengan perayu, sebuah syarikat insurans, di bawah dua polisi E insurans. Pada 11 Oktober 1984, amaun-amaun yang diinsuranskan di bawah kedua-dua polisi itu telah ditambah. Pada 30 November 1984, suatu kebakaran berlaku dan mengakibatkan kerosakan kepada premis dan barangan tersebut. Justeru itu, penentang-penentang menuntut terhadap perayu untuk kerosakan tersebut. Kemudiannya, F prosiding jenayah dimulakan terhadap penentang-penentang di bawah s 436 Kanun Keseksaan (NMB Bab 45) di Mahkamah Sesyen Taiping. Penentang-penentang dibebaskan.

Di perbicaraan, perayu mengatakan bahawa penentang-penentang telah menyembunyikan barangan kelengkapan rumah dan barangan lain dari premis sejurus sebelum berlakunya kebakaran. SP2 dan G SP3, yang telah memberi keterangan di perbicaraan jenayah di hadapan Mahkamah Sesyen Taiping, memberi keterangan untuk perayu di perbicaraan. Keterangan utama SP2 berbeza secara material dari apa yang telah diberikannya di perbicaraan jenayah dan bercanggah dengan apa yang diberikan oleh SP3. Hakim yang arif, H selepas menilai keterangan, menolak hujah perayu bahawa terdapat fraud pada pihak penentang-penentang dalam membuat tuntutan tersebut. Beliau menerima penjelasan penentang-penentang bahawa kebanyakan daripada bahan-bahan bukti kerugian yang didakwakan itu telah musnah dalam kebakaran tersebut yang berlaku berdekatan dengan tarikh premis dan kandungannya diperiksa oleh ejen perayu I untuk kali yang terakhir. Penghakiman telah dimasukkan untuk jumlah-jumlah yang diinsuranskan. Dalam menyokong kebolehpercayaan SP2 dan SP3, adalah dihujahkan bahawa: (i) tiada penghalusan kehakiman

A sebenar akan keterangan mereka; dan (ii) penentang-penentang telah tidak membuktikan kerugian sebenar mereka atas polisi-polisi tersebut yang telah tidak dinilaikan.

Diputuskan, menolak rayuan:

B (1) Hakim yang arif adalah berhak untuk mengambil kira perselisihan dalam dan antara keterangan-keterangan SP2 dan SP3. Serangan terhadap pendapat hakim yang arif bahawa tiada fraud pada pihak penentang-penentang dalam membuat tuntutan tersebut sebenarnya berasaskan penghalusan kehakiman akan keterangan yang mana prinsip kelebihan pandang dengar adalah terpakai. C Mahkamah, yang tiada kelebihan yang dipunyai oleh hakim perbicaraan, tidak berkedudukan untuk menyatakan sama ada SP2 dan SP3 bercakap benar (lihat ms 470D–I dan 471A); *Clarke v Edinburgh Tamways Co* (1919) SC (HL) 35 diikut.

(2) Kedekatan dalam masa antara pemeriksaan oleh ejen insurans D perayu dan kebakaran tersebut — diambil bersama kemusnahan dokumen-dokumen sokongan — memberi hak kepada hakim yang arif untuk membuat kesimpulan bahawa kerugian yang dituntut itu telah dibuktikan. Selanjutnya, di mana suatu polisi insurans tidak dinilaikan, seperti yang dalam kes ini, ia merupakan suatu persoalan fakta atas keterangan sama ada kerugian telah E dibuktikan secara memuaskan kepada pembicara fakta-fakta primer yang telah diamanahkan oleh undang-undang kewajipan untuk menilai keterangan (lihat ms 471B–D).

Per curiam:

F Manakala s 157 Akta Keterangan 1950 membenarkan kenyataan konsisten terdahulu untuk digunakan bagi menyokong testimoni seseorang saksi, ia adalah pengesahan yang paling lemah. Pengulangan, walaupun dibuat beratus-ratus kali, tidak boleh mengukuhkan testimoni yang mempunyai kelemahan (lihat ms 470C); *Mohamed* G *Ali v PP* [1962] MLJ 230 diikut.]

Notes

For cases on appeal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 259–699.

For cases on fire insurance, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) H paras 56–80.

Cases referred to

Clarke v Edinburgh Tramways Co [1919] SC (HL) 35 (folld)
Mohamed Ali v PP [1962] MLJ 230 (folld)

I

Legislation referred to

Evidence Act 1950 s 157
Penal Code (FMS Cap 45) s 436

Appeal from: Suit No C 5187/1985 and Suit No C 5188/1985 (High Court, Kuala Lumpur) A

Porres Royan (*Romesh Abraham* and *Teng Chong Moi* with him) (*Shook Lin & Bok*) for the appellant.

Leong Yeen San (*Low Hop Bing Koh Kong & Associates*) for the respondents. B

Gopal Sri Ram JCA: These appeals are against the decision of the High Court entering judgment for the respondents in the sum of RM200,000 in favour of the first respondent and in the sum of RM250,000 in favour of the second respondent. The claims arose out of damage caused to the C premises and goods of the respondents in a fire which occurred at about 3.30am on 30 November 1984. The premises and goods in question were insured with the appellant insurer company under two policies of insurance. The first policy was issued on 9 June 1984 ('the first policy'). It was valid until 9 June 1985. At the date of its issue, the sum assured was RM120,000 for the building and RM30,000 for household effects. The policy in D respect of the second respondent ('the second policy') was issued on 16 July 1983 and expressed to be valid until 16 July 1985. It was in respect of stock-in-trade which was housed within the building in question. That stock-in-trade was valued at RM150,000 for the purpose of the second policy. E

On 11 October 1984 — that is to say, about four months after the first policy was issued — the amount insured under the first policy was increased. In respect of the building, it was increased from RM120,000 to RM150,000. In respect of the household effects, it was increased from RM30,000 to RM50,000. Simultaneously, the second policy was also F increased in value from RM150,000 to RM250,000.

In the fire which occurred, to which we adverted a moment ago, the building, the household effects and the stock-in-trade were completely destroyed. On that there is no dispute.

Suspicion for the fire naturally fell upon the respondents. Police G investigations were conducted and culminated in the two respondents being charged at the Taiping Sessions Court under s 436 of the Penal Code (FMS Cap 45). At that trial, two witnesses gave evidence. They were the respondents' neighbours. They were both taxi drivers. I will allude to their evidence later when I come to deal with the assessment made by the learned judge of their testimony. H

At the close of the prosecution's case, the learned sessions court judge acquitted both the respondents without calling upon them to enter their defence. An appeal was lodged against this decision, but later discontinued.

In the actions brought by the respondents against the appellant, they I claimed for the sums insured under the respective policies. For completeness, I state that the actions had been commenced before the institution of criminal proceedings and were consolidated. The consolidated

A actions were heard before the High Court over several days in 1993 and mid-1994, that is to say, about 10 years after the fire. Both respondents gave evidence. For the defendants, the two neighbours of whom I spoke earlier in the judgment also gave evidence.

It was suggested to the respondents under cross-examination that B they had secreted away household and other goods from the premises shortly before the fire. These suggestions were denied by both respondents. A suggestion was also made that there had been an ulterior motive for the increase in value of the respective insurance policies. However, each respondent gave an explanation — which I propose not to dwell upon — for making the increase. It is common ground between the parties that an C insurance agent, Mr Teo Cheng Chai negotiated both policies. He also inspected the premises and the contents before the increases were effected. Unfortunately, he could not be traced and could not be called as a witness by either side. The appellant, in resisting the claim, relied primarily on two grounds. It was contended that the appellant was not liable because there D had been fraud on the part of the respondents in making the claim. The fraudulent intent relied on was based upon the alleged removal of goods and the close proximity between the increases in the value of the respective policies and the fire.

As I have said, the two neighbours gave evidence for the appellant. Each had given a statement to the adjuster who had been subsequently E employed by the appellant to investigate the claim. Each was cross-examined vigorously. In the case of the first neighbour (DW2), he was confronted with the evidence he had given before the Taiping Sessions Court which was materially different from that which he gave in examination-in-chief. His explanation for the inconsistency may be quite confidently described F as feeble. There were also contradictions between his evidence and that of the other neighbour (DW3). The learned judge, after assessing all this evidence, came to the conclusion that no fraud had been practised by the respondents and accordingly, repelled the defence mounted on that ground.

The second defence advanced by the appellant was also rejected by G the learned judge. It related to the fact that the respondents had been unable to produce to the appellant satisfactory evidence in proof of the alleged loss that each had suffered. Some documents had been given. But most of the material asked for by the appellant had perished in the fire. The learned judge accepted that explanation. Since the fire had taken place close to the date when the premises and contents were last inspected, H the learned judge, no doubt applying the law of averages, chose to enter judgment for the sums insured.

The present appeals are directed against these findings. Before us, Mr Royan renewed, on behalf of the appellant, the defences advanced in the court below. In support of his appeal, he identified two broad areas of I criticism where he said that the learned judge had gone wrong. His first complaint was that there was no real judicial appreciation of the evidence of DW2 and DW3, in consequence of which the true value of their evidence was overlooked by the learned judge.

The second ground of complaint was that the learned judge failed to realize that the policies in question were unvalued and that it was therefore incumbent on the respondents to prove their actual loss.

Mr Royan has taken us meticulously through the evidence. He has, with his usual care, advanced his arguments in support of the credibility of the two witnesses, DW2 and DW3. He has also drawn our attention to the consistency of the evidence-in-chief of each of these witnesses and the statements which they had given respectively to the appellant's adjuster.

I pause to say that while s 157 of the Evidence Act 1950 allows such previous consistent statement to be used to support the testimony of a witness, it is confirmation of the weakest kind. Repetition, though it be made a hundred times over, cannot make firm testimony that suffers from infirmity (see *Mohamed Ali v PP* [1962] MLJ 230).

On the other hand, the learned judge noticed and took into account discrepancies in and between the evidence of DW2 and DW3. This he was certainly entitled to do. The totality of Mr Royan's attack against the learned judge's finding against the first ground is really based on judicial appreciation of evidence to which the audio visual advantage rule applies. The complaints made by Mr Royan are, I think, sufficiently met by the following passage in the speech of Lord Shaw in *Clarke v Edinburgh Tramways Co* [1919] SC (HL) 35 at p 36:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case, things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question: am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

I must confess my own inability to locate a clearer statement reflecting the duty of an appellate court in a case where findings of fact are asked to be reviewed. For my part, I would, with great respect, follow the example of Lord Shaw and ask myself the same question: am I sitting here, bereft of the advantages which the trial judge had, in a position to say whether DW2 and DW3 were telling the truth?

A I have little difficulty in answering that question in the negative. I would therefore defer to the views expressed by the learned trial judge about the credibility of the two witnesses. For this reason, I would reject the arguments advanced by Mr Royan in support of the first ground.

I now turn to the second ground. As pointed out in the course of B argument by my learned brother NH Chan JCA, the close proximity in time between the inspection by Mr Teo Cheng Chai and the fire — taken together with the destruction of supportive documents — well entitled the learned judge to conclude that the loss as claimed had been established. I entirely associate myself with the sentiments expressed by my learned brother. I too am of like mind.

C In cases such as this, where the policy is unvalued, it is a question of fact on the evidence whether the loss has been proved to the satisfaction of the trier of primary facts to whom the law has entrusted the duty to assess the evidence. For this reason, I would once again defer to the assessment of the learned judge. I am entirely satisfied that there is sufficient material D in the record provided to us in these appeals to support the trial judge's findings.

In the circumstances, I am of the opinion that these appeals are without merit. I would dismiss them and make those orders which are usually consequent upon a dismissal.

E **NH Chan JCA**: I agree.

Abdul Malek Ahmad JCA: I concur.

Appeals dismissed.

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Reported by Yong Yuan Kea

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